

U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 19 January 2007

BALCA Case No.: 2005-INA-00194
ETA Case No.: P2003-CA-09542234/JS

In the Matter of:

JACQUES GOURMET, INC.,
Employer,

on behalf of

ULISES OMAR SANTOYO-PACHECO,
Alien.

Certifying Officer: Martin Rios
San Francisco, California

Appearance: Susan M. Jeannette, Immigration Consultant
Del Mar, California
For the Employer and the Alien

Before: **Burke, Chapman and Vittone**
Administrative Law Judges

DECISION AND ORDER

PER CURIAM. This case arises from an Employer's request for review of the denial by a U.S. Department of Labor Certifying Officer ("CO") of its application for labor certification. Permanent alien labor certification is governed by Section 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A), and Title 20, Part 656 of the Code of Federal Regulations ("C.F.R.").¹ We base our decision on the record upon

¹ This application was filed prior to the effective date of the "PERM" regulations. *See* 69 Fed. Reg. 77326 (Dec. 27, 2004). Accordingly, the regulatory citations in this decision are to the 2004 edition of the Code of Federal Regulations published by the Government Printing Office on behalf of the Office of the Federal Register, National Archives and Record Administration, 20 C.F.R. Part 656 (Revised as of Apr. 1, 2004), unless otherwise noted.

which the CO denied certification and the Employer's request for review, as contained in the appeal file ("AF"), and any written arguments. 20 C.F.R. § 656.27(c).

STATEMENT OF THE CASE

On April 16, 2001, Employer, Jacques Gourmet, Inc., filed an application for labor certification to enable the Alien, Ulises Santoyo-Pacheco, to fill the position of Baker. (AF 67). Six years of grade school and two years of experience were required.

One U.S. applicant responded to the advertisement for the position. (AF 84). By letter dated November 12, 2002, Employer wrote the applicant advising that her interview would be conducted on November 21, 2002 at 9:00 a.m., and that she should bring her letters of reference. (AF 73). The letter indicates it was sent by certified mail. On December 9, 2002, Employer submitted its recruitment report, indicating that the applicant was telephoned on November 5, 2002 at 5:56 p.m., and that her telephone was out of service. (AF 71). As of the date of the recruitment report, the applicant had yet to sign for the letter. The applicant was rejected for not attending the interview, and for being either unavailable or not interested in the position.

On December 20, 2004, the CO issued a Notice of Findings ("NOF") proposing to deny certification on the basis of the rejection of a U.S. worker for other than lawful, job-related reasons. (AF 62). The CO found that Employer failed to submit the certified mail receipt indicating when the letter was mailed, or if it was sent certified. The CO noted that the reason for the telephone being out of service was not known nor was it known if the service was later reinstated. The CO reasoned that where the Employer's letter followed "presumably not before December 12,"² it does not appear that the employer made a vigorous, good faith attempt to contact the applicant." Employer was directed to provide the certified mail receipt to show when the letter was mailed and if the Employer requested a return receipt. Employer was also directed to explain why references were being requested when the applicant had already provided a significant reference.

² This appears to be an inadvertent error, the CO evidently having intended to state November 12.

Employer submitted rebuttal on January 6, 2005. (AF 35). Employer argued that actual contact is not necessary to establish good faith recruitment, only reasonable efforts to contact applicants. Therefore, according to Employer, the CO cannot require certified mail, return receipt requested to prove actual contact with the applicant. Rather, Employer must be given an opportunity to prove that its overall recruitment efforts were in good faith. Employer contends the applicant's telephone number was disconnected and Employer could not obtain records of the date of disconnection or possible re-connection. Employer states that the resume had an additional telephone number handwritten in and that number was called and a message was left. Employer contends that it also telephoned the applicant at her workplace, "but the employer was not able to locate her there." The applicant's letter of reference was not on business stationary and the other most recent employer, "USPS" did not have any contact information.

According to Employer, its only alternative was to send a letter by certified mail, return receipt requested. Employer did so, but it never received the green return receipt card. Employer asserted that the letter was apparently never signed for and Employer was never contacted by this applicant. Employer stated it no longer had the mailing part of the certified mail return receipt "since the letter was sent so long ago." Employer reiterated that it made good faith efforts to contact this applicant. A declaration from Employer's Human Resources Manager is attached to the rebuttal, attesting to the efforts made as well as to the fact that the letter was never returned to Employer by the postal service. (AF 42).

A Final Determination was issued on January 25, 2005. (AF 12). The CO found that where Employer claims to have sent a certified letter, it should have included at least the mailing receipt. The CO conceded that Employer was correct in its argument that certified mail was not required; however, it would have been prudent, because if such documentation had been provided in rebuttal, the CO would have approved the application. Without such a record, the CO held that Employer had not documented sufficient efforts to contact and recruit the sole U.S. applicant.

On February 9, 2005, Employer submitted a Request for Reconsideration and/or Appeal to the Board of Alien Labor Certification Appeals. (AF 1). The CO denied the request for reconsideration on July 11, 2005 and this matter was then forwarded to the Board of Alien Labor Certification Appeals (“BALCA” or “Board”). (AF 28).

DISCUSSION

An employer who seeks to hire an alien for a job opening must demonstrate that it has first made a good faith effort to fill the position with a U.S. worker. *H.C. LaMarche Ent., Inc.*, 1987-INA-607 (Oct. 27, 1988). Actions which indicate a lack of good faith recruitment are grounds for denial. 20 C.F.R. §§656.1, 656.2(b). It is the employer who has the burden of production and persuasion on the issue of the lawful rejection of U.S. workers. *Cathay Carpet Mill, Inc.*, *supra*.

In *Bay Area Women's Resource Center*, 1988-INA-379 (May 26, 1989) (*en banc*), it was held that where an employer only attempted to contact a U.S. applicant at one of three possible telephone numbers and no attempt was made to contact her by mail, the employer's two messages did not constitute reasonable efforts to contact a qualified U.S. worker. In this case, Employer claims to have attempted to contact the applicant by telephone and certified mail. Employer claims not to have proof of the mailing because the “letter was sent so long ago.” Employer knew to attempt more than one method of contact, yet failed to keep track of the documentation it should have known would be needed to prove good faith recruitment efforts.

Employer correctly argues that this Board has held that good faith efforts do not require proof of actual contact and that the use of certified mail is not mandatory. *See M.N. Auto Electric Corp.*, 2000-INA-165 (Aug. 8, 2001) (*en banc*). In that case, however, it was also held that an employer might have to use more than one method to contact an applicant if the first attempt fails to elicit a response, and that a bare assertion without supporting reasoning or evidence is generally insufficient to carry an employer's burden of proof. Employer claims to have utilized a second method of contact, that being

certified mail. Employer fails, however, to provide documentation of this effort. Employer has none of the documentation which should have been available if certified mail had been utilized, and has provided no more than bare assertions without supporting evidence. The totality of the evidence herein fails to establish a good faith recruitment effort. Labor certification was properly denied.

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

Entered at the direction of the panel by:

A

Todd R. Smyth
Secretary to the Board of
Alien Labor Certification Appeals

NOTICE OF PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within twenty days from the date of service a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of Board decisions; or (2) when the proceeding involves a question of exceptional importance. Petitions for review must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W.
Suite 400 North
Washington, D.C., 20001-8002.

Copies of the petition must also be accompanied by a written statement setting forth the date and manner of that service. The petition must specify the basis for requesting review by the full Board, with supporting authority, if any, and shall not exceed five double-spaced typed pages. Responses, if any, must be filed within ten days of service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of a petition the Board may order briefs.